

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

76-1291

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1291

UNITED STATES OF AMERICA,

Appellee,

v.

JEROME RAPOPORT,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR
DEFENDANT JEROME RAPOPORT**

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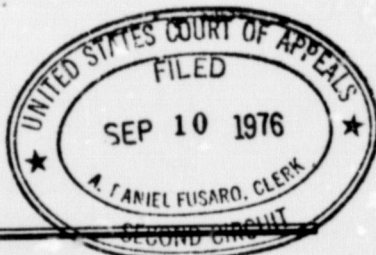


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Preliminary Reply Statement

Read as a whole, the prosecution's brief argues that Rapoport is a very guilty man, that any prosecution misconduct therefore was harmless, and that our main brief essentially attempts to free this very guilty man on "technical" grounds. But whether Rapoport is a very guilty man was for a jury to decide. Two juries could not agree. A third jury did. The only question on this appeal therefore is whether that agreement was reached after a fair trial based upon evidence sufficient to establish the case which

the prosecution, after two hung juries, finally decided to bring.

If the prosecution's case was strong, there was no need for a summation which the prosecution now virtually admits was improper and attempts to excuse by the very verdict it engendered. And if Rapoport's other arguments are "technical" (which we dispute), the prosecution at the least should not forget that these "technicalities" exist only because the prosecution's third indictment added perjury charges based upon immaterial second trial testimony and false statement charges based upon an alternative and seldom pleaded theory of guilt as an aider and abettor in violation of 18 U.S.C. 2(b).

The short of the matter is that the government could have elected to try Rapoport a third time on the *Entre Nous* charge. It did not, but instead filed a third indictment which proliferated charges and, in the process, created substantial questions of law. Nor is there merit to the claim that the third indictment was not a proliferation, but rather resulted from "additional investigation and development of new counts" which enabled the prosecution "fully and clearly" to demonstrate Rapoport's pattern of conduct (GB 19)*. The truth is that all of the additional eight counts contained in the third indictment were based upon testimony given by the very same witnesses *at the second trial*, after prior interviews by the Federal Bureau of Investigation.

The third indictment therefore did not represent the results of "additional investigation" between the second and third trials. If the eight new counts were not in fact designed to leverage the case against Rapoport after two unsuccessful trials, then the question must arise as to why the six additional false statement counts were not included in the second indictment and determined at the second trial.

* Reference "GB" are to the prosecution's brief.

Replying to the prosecution's statement of facts.

The false statement counts each charged that Rapoport failed to disclose a fee which he was to be paid "for obtaining the loan" in question. The prosecution's reference to the need for disclosure of compensation paid for "services of any nature whatsoever" thus constitutes a remarkable post-trial variance from those charges as pleaded (GB 3).

It is erroneous to state that Rapoport "instructed his clients to omit his name and fee from the applications" (GB 3). There was no evidence of any conversation of this sort with the principals of Smuggler's Attic or American Medical Supply Company, two of the four clients involved.

Rapoport did not claim that "calling" his fee a consulting fee avoided the necessity of disclosure (GB 3). Rapoport testified that his fees were consulting fees in fact and therefore did not require disclosure.

Rapoport's fees were not "illegal fees" (GB 3). The fees were legal, as Judge Brieant instructed (Tr. 1197). The question was why the fees were to be paid and if they should have been disclosed.

The prosecution's use of the tape recordings is misleading. A portion of a July 18, 1974 tape recording is set forth (GB 6). Asterisks are used to indicate a deletion. What is deleted is Pollak's failure to challenge Rapoport's statements that Pollak was not paying Rapoport "to get the loan", and that Rapoport did not wish to be paid for that purpose (A 188). In the circumstances of this case, where Pollak at the time was acting as a government agent, Pollak's failure to contest Rapoport's disclaimers consti-

tuted a tacit admission that Rapoport was telling the truth about the nature of his agreement with Pollak.

Moreover, having dealt with some of the tape recordings at length, the prosecution pays no attention whatsoever to the final tape recording of August 13, 1974 which exonerates Rapoport. The transcript of that recording is set forth in full in the appendix and respectfully is referred to this Court (A 189-199).

Rapoport did not deny receiving cash from American Medical Products Company at the second trial (GB 13). He was asked on cross-examination if he had received cash "on that loan" (A 17-18), and, since he denied receiving any payments on any loan, his answer to *that* question necessarily was negative. The claim that he denied receiving cash at all is misleading, especially in view of *Bronston v. United States*, 409 U.S. 352 (1973) which held specifically that a witness need respond only to the question which is asked.

II

Replying to the prosecution's defense of its conduct during summation.

The prosecution admits that the statement as to "best counsel money can buy" was improper. It argues however that the comment was not directed at counsel, but was no more than a "colloquial expression reflecting on the defendant's hopeless situation arising from his own criminal conduct" (GB 21). The prosecution also relies upon *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and finally upon what it calls the overwhelming evidence of guilt.

We leave to this Court the intent and meaning of the improper statement. We believe of course that it represented precisely what we have stated in our main brief,

namely, an argument that Rapoport, in a case involving money, was a rich man trying to buy justice.

The *SoCony-Vacuum* case actually supports Rapoport. There the Supreme Court said quite clearly that an analogous but less pernicious statement was wholly improper and out of keeping with ordinary concepts of prosecutorial responsibility. It did not reverse for several reasons, among which were its explicit finding that corporate wealth was relevant in an anti-trust prosecution and the fact that no objection had been made to the comment during the trial. *Id.*, 310 U.S. at 238.

The prosecutor's comment was improper. It also was prejudicial, especially in the context of this case. And it was made despite the repeated recent warnings of this Court that it would not for long tolerate improper government argument during criminal trials. *United States v. Bivona*, 487 F.2d 443, 447 (2d. Cir. 1973); *United States v. White*, 486 F.2d 204 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). The conviction should be reversed for this reason alone.

The prosecution likewise makes no attempt to deny that, in what purported to be an objection to defense counsel's summation, the prosecutor testified to a prior consistent statement of Pollak's which would not have been admissible even from Pollak on the witness stand (GB 26-27). It excuses this impropriety with allegations that evidence either a misunderstanding or distortion of the trial record (GB 24-27). Unfortunately, a short recitation of the evidence is necessary.

Pollak testified that he met with Rapoport on March 21, 1974 and agreed to pay Rapoport 10% of any SBA loan which Rapoport could obtain for Entre Nous. Pollak testified that thereafter—in April or early May 1974—Rapoport told him to conceal the fee by inserting "NONE" in paragraph 10 of the Entre Nous loan application. The application was filed in that form later in May.

The only charge was that Rapoport had caused Pollak to file a false application in causing Pollak to insert "NONE" in paragraph 10. The only evidence to support that charge was Pollak's testimony—unrelated to his testimony of the purported 10% fee agreement in March—that Rapoport had told him in April or early May to report "NONE" in paragraph 10 (Tr. 409-410, 504-505).

During Pollak's cross-examination, it was established (a) that Pollak had not told the grand jury of this alleged April or early May conversation with Rapoport about paragraph 10 (Tr. 504-505), and (b) that Pollak told Assistant George Wilson on June 6, 1974, shortly after Rapoport allegedly had instructed him to falsely state "NONE" in paragraph 10, that all of the papers submitted to the bank including the loan application were in accordance with the law (Tr. 513-514).

In summation, in reference to a series of demonstrably false portions of Pollak's testimony (Tr. 1115-1121), defense counsel referred to this cross-examination and argued that Pollak's claim of having discussed the loan application with Rapoport in April or early May was demonstrably false. The unmistakable thrust of this argument was that Pollak had never connected Rapoport with the insertion of "NONE" in paragraph 10 prior to trial, that Pollak's testimony was fabricated, and that there was therefore no credible evidence that Rapoport had "caused" Pollak, the principal, to make a false statement.

It was in this context that the prosecution objected and volunteered that "there is no question that Pollak told [AUSA] Wilson about Rapoport's fee" (A 151). But whether Pollak told Wilson about his version of the March fee arrangement had nothing to do with what Pollak told Wilson—or the grand jury—about Rapoport causing a

false statement two months later in May. The prosecutor's comment in short was unresponsive to the summation in progress, constituted prosecutorial testimony of a fact neither in evidence nor even admissible, and, at least as significantly, created the vital misimpression that defense counsel was misleading the jury.

In fact, the defense summation was based flatly on the record and on the truth. Pollak never told Wilson in June that Rapoport had caused a false statement in April or early May. Nor did Pollak so testify in the grand jury or at any other time prior to Rapoport's first trial.*

The short of the matter is that the prosecution misconstrues the record of this case, that defense counsel's summation was based entirely upon the record and did not distort the truth, and that the prosecutor's uncalled for speaking objection amounted to nothing more than improper prosecutorial testimony on the ultimate issue, namely, the nature of the fee arrangement.

Whether or not this uncalled for speaking objection resulted from a mistaken understanding of the record, its damage is clear. It improperly reinforced Pollak's testimony as to the fee agreement and it also cast doubt on the credibility of Rapoport's counsel. Its impact was of a kind with the argument about "best counsel money can buy." It likewise requires reversal.

* The grand jury omission was not inadvertent. Pollak was asked about illegal counselling by Rapoport on disclosure. He agreed there had been such counselling and placed it in July, when the loan closed, two months after his June interview with Wilson, and even then in connection with a closing document which was not the subject of any charge in this case (Second trial Tr. 287-299, third trial Tr. 504-505).

III

Replying to the prosecution's argument that the perjury counts involved material testimony at the second trial.

First, we have no recollection of Judge Brieant ever inviting a motion for severance of the perjury counts (GB 23). Even if such an invitation had been made, it necessarily would have been refused, since severance of the perjury counts would have meant yet a fourth trial for Rapoport, with the additional and untenable economic and emotional burden which four trials in one year would entail.

More basically, the prosecution's argument that the perjury counts were based upon *material* second trial testimony simply misses the point (GB 30-33). The only issue at the second trial was the nature of the agreement between Pollak and Rapoport, namely, whether Rapoport agreed to accept a fee in return for obtaining the Entre Nous loan, or whether Rapoport agreed to accept a fee only to act as a future consultant, or at least believed that to have been the fact. Determination of this issue raised a pure question of fact to be resolved by the jury's assessment of the credibility of Rapoport's testimony as opposed to Pollak's. The evidence of Rapoport's conduct in connection with American Medical Products loan proved nothing in that regard, was pure propensity evidence, and therefore was both inadmissible and immaterial. In fact, the prosecution itself stressed at trial and now on this appeal that the transactions were totally unrelated (GB 2-3; Tr. 463-465, 610, 646-647, 674-675).

There likewise is no merit to the argument that the "clandestine manner of payment" in the American Medical transaction was "highly probative" of Rapoport's

state of mind in connection with the Entre Nous transaction (GB 33). First, the payments were not clandestine at all. While made in cash, they were booked by American Medical as a payment to Rapoport (Tr. 658-660). They were no different therefore than payment by check insofar as concealment is concerned. Further, an IRS 1099 Information Return was filed by American Medical naming Rapoport as the recipient of these cash monies (Tr. 649-653).

In any event, even assuming that the cash payments from American Medical were "clandestine", evidence of this at best only served to prove guilty consciousness on *that* loan, and not on any other. Viewed in that light, guilt on the American Medical loan would only prove propensity, a fact which had no permissible relevance in determining Rapoport's guilt or innocence of the only charge at the second trial, namely, the admittedly unrelated Entre Nous loan transaction.

Similarly, there is no merit to the claim that defense counsel did not object to this line of proof at the second trial. The record of that trial is replete with objections to the massive amount of so-called "similar act" evidence, (Tr. 407, 422, 512, 529, 564, 859, 880), and the rebuttal testimony of Samarel and Raymond (American Medical) was not only subject to objection, but was the basis for a motion for a mistrial at the second trial (Tr. 900-901).

Nor is there substance to the prosecution's claim that the cross-examination on the American Medical transaction was material since it bore generally on Rapoport's credibility as a witness. Indeed acceptance of such a rationale would mean a perjury indictment could rest upon any response during cross-examination at a prior trial which, in the prosecution's view, was false.

Further, the only case which the prosecution cites in support of this last rather broad view of materiality does not support its position. In *United States v. Letchos*, 316 F.2d 481 (7th Cir.), *cert. denied*, 375 U.S. 284 (1963), the defendant had been a witness at a prior trial of one Accardo. It had been part of Accardo's defense at his trial that Accardo was a beer salesman. Letchos, the defendant in the case in question, testified at Accardo's trial that he had sold several cases of beer to Accardo. His testimony was directly material to a determination of Accardo's guilt or innocence, since it tended to corroborate Accardo's defense that he was in fact a beer dealer. Letchos however had given earlier statements to the FBI in which he denied ever seeing or meeting Accardo. At Accardo's trial, Letchos denied having made any prior inconsistent statements to the FBI and his denial was made the subject of a perjury charge. Letchos' denial of the prior inconsistent FBI statements obviously was material. Had Letchos truthfully admitted his prior statements to the FBI, then his testimony that he had sold beer to Accardo—so clearly material—would have been severely impeached. In short the cross-examination which formed the basis for a perjury charge in the *Letchos* case was directed at the central issue in the *Accardo* case, namely, whether Accardo's claim that he was a beer dealer was true.

For these and other reasons stated in our main brief, the American Medical loan transaction was entirely immaterial to a determination of Rapoport's guilt or innocence in connection with the unrelated Entre Nous loan transaction. Rapoport's testimony at the second trial in connection with the American Medical transaction therefore also was immaterial and could not properly serve as the basis for the perjury counts included in the third indictment.

IV

Replying to the prosecution's argument that the guilt or innocence of the borrowers is irrelevant under 18 U.S.C. 2(b).

With two additional comments, we rely on our main brief.

The prosecution argues that 18 U.S.C. 2(a) and 18 U.S.C. 2(b) in effect are the same (GB 35-36). If so, then Section 2(b) is redundant, a conclusion which Congress could not have intended and which the cases do not support. As we have stated, Section 2(b) was intended to punish individuals who commit crimes through unknowing intermediaries. The borrowers in this case knew all the facts. There was therefore no evidence to support a Section 2(b) conviction.

The prosecution also argues that Section 2(b) should be read literally and that "the very language of the statute makes the guilt or innocence of the person who is caused to commit the offense irrelevant . . ." It concludes that the only requirement for a Section 2(b) conviction is that the defendant caused the commission of a criminal action with requisite criminal intent on his part (GB 30). There is no merit to this claim, since a literal reading of Section 2(a) would support the same conclusion. But this would create an identical redundancy and is not supported by case law which requires a guilty principal to support a Section 2(a) conviction as an aider or abettor.

The only rational construction of 18 U.S.C. 2 leads to the conclusion that Section 2(a) punishes those who assist guilty persons in the commission of crimes, and that Section 2(b) punishes those who, through domination of a knowing intermediary or deception of an unknowing intermediary, causes the intermediary to act in a manner which is criminal. There was no such evidence in this case.

V

Replying to the prosecution's argument that concealment satisfies the requirements of 1014 and the part of 1001 charged.

The prosecution's reliance on various criminal tax cases is misplaced (GB 40). 26 U.S.C. 7206 (1) punishes both affirmative false statements and omissions. *United States v. Tager*, 479 F.2d 120 (10th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974). In contrast, 18 U.S.C. 1014 and that portion of 18 U.S.C. 1001 charged in this case prohibit affirmative misrepresentations only. *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963).

The other cases relied on by the prosecution are equally inapposite. *Robinson v. United States*, 343 F.2d 1006 (10th Cir.), *cert. denied*, 382 U.S. 839 (1965) and *United States v. Goberman*, 329 F. Supp. 903 (M.D. Pa. 1971), *aff'd* 458 F.2d 226 (3d Cir. 1972) involve affirmative false statements as to the borrower's liabilities. These cases would be relevant only if, for example, the various loan applications had reported that Rapoport received \$500 as a fee when in fact he received substantially more or, as in *Entre Nous*, the affirmative misrepresentation "NONE" had been made. But the other loan applications were silent. Accepting the prosecution's evidence, the loan applications failed to disclose a fee. But a failure to disclose, e.g., an omission, violates neither of the statutes as charged. This is particularly telling, and particularly binding, since the prosecution might have reached non-disclosure under the "fraud" portion of 18 U.S.C. 1001. But the prosecution included no such charge.

Apparently recognizing its error, the prosecution argues that at least the certifications of the loan applications were

false (GB 40-41), as in *United States v. Grasso*, 356 F. Supp. 814 (E.D. Pa.), *aff'd*, 485 F.2d 682 (3d Cir. 1973). But this theory of guilt was never advanced at the trial for the obvious reason that its proof would have required evidence that Rapoport obtained the loan (See *e.g.* A 178). There was no such evidence. Moreover, no evidence was even offered that Rapoport caused the certifications to be executed. Thus, quite aside from the material variance of this new theory of guilt, there was no evidence to support it.

VI

Replying to the prosecution's argument on the jury instructions.

There is no dispute that Judge Brieant left out an important part of the accepted instruction on a defendant's motive to give false testimony. The excuse is that this was harmless in face of overwhelming evidence of guilt. But guilt or innocence turned upon word against word, the prosecution witnesses all were immunized, and the verdict followed a reading of some of Rapoport's testimony. Two hung juries evidence the serious credibility issue. Judge Brieant's truncated instruction was not harmless since it said that a defendant was highly motivated to falsify but did not say, as is usual, that defendants nonetheless can tell the truth.

The prosecution is wrong that no objection was taken. A proper written request was submitted and Judge Brieant gave an exception to his failure to charge as the defense requested in this and other written requests (Tr. 1202).

The requested instruction on good faith was proper. It was not adequately covered in other portions of the jury charge. And, for reasons already stated, the instruction on the probative value of the American Medical evidence was incorrect.

The prosecution also is wrong in alleging a dispute as to the vote at the second trial and Judge Briant erred in suggesting that Rapoport was wrong when he said that vote was 9-3 for acquittal. Indeed it is surprising that the prosecution now takes issue with this fact since it did not do so at the third trial when, during objections to the court's instructions on the issue, defense counsel specifically stated that the jurors at the second trial "told John Kenney it was nine to three, and they told us nine to three". (Tr. 1203).

The footnote description of the facts as set forth at GB 19 is totally in error. After the jury reported its deadlock at the second trial and was discharged, defense counsel and Rapoport deliberately remained in the courtroom in order to give the jury time to leave the courthouse. While sitting in the courtroom, defense counsel saw Mr. Kenney speaking with two of the jurors in front of the elevator bank in the corridor. Mr. Kenney then returned to the courtroom and, upon inquiry by defense counsel, said that the jurors had stated the last vote had been 9-3 in Rapoport's favor. Thereafter, two other jurors entered the courtroom and expressed their regrets to defense counsel and Rapoport that they had been unable to persuade the holdouts. Those jurors confirmed Mr. Kenney's report that the last vote had been 9-3 in Rapoport's favor. They even asked defense counsel if defense counsel could guess at the three holdouts. We stand ready of course to provide this information in any form which this Court might feel appropriate or necessary.

VII

Replying to the prosecution's argument that it was proper to withhold information from Manufacturer's Trust Company.

The prosecution misses the point which is that it engaged in the same concealment as it alleged against Rapoport in the Entre Nous case. Pollak had told of the alleged finder's fee. The prosecution obviously believed Pollak since it gave him immunity and recording devices. It knew the alleged fee had not been disclosed since it had seen the application which had been filed more than two months before the closing. The alleged crime was complete, as the prosecution argues and admits. Its concealment influenced the Bank to act favorably to the borrower.

There was no legitimate enforcement purpose in withholding this information from the Bank in order to assist its star witness in obtaining \$80,000 in July and \$15,000 in October for his company's use. The claim that the prosecution could not disclose what was only a suspicion is ludicrous. Not a single additional piece of incriminating evidence was developed after the prosecution's concealment, and it sought and obtained an indictment on the evidence it already had. Certainly payment to Pollak was not necessary to fund payment of Rapoport's alleged finder's fee. First, the prosecution says Pollak, as a prosecution witness, had no intention of paying Rapoport a dime (GB 50). Second, payment into escrow with the Bank's cooperation

and under government control could have served this purpose in any event without misleading the Bank to Pollak's benefit.

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Respectfully submitted

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